[APPELLATE BANKRUPTCY JURISDICTION]

Re TAN TENG HIAN TRADING AS CHEE SENG RUBBER WORKS, and Re CHOP HOE SENG

[SINGAPORE BANKRUPTCIES Nos. 705 and 739, CONSOLIDATED]

[SINGAPORE CIVIL APPEAL No. 14 of 1932]

Bankruptcy—Charges for Municipal services —priority.

Ordinance No. 44 (Bankruptcy) section 43 (1) (c) gives priority to "any sums due.....from the bankrupt to the Municipal Commissioners in respect of rates or taxes for the current year." Ordinance No. 135 (Municipal) section 253 (9) provides that "all moneys.....due in respect of the supply of gas or electricity..... shall be recoverable in like manner and by the like procedure as if such moneys were taxes leviable under the Ordinance."

Held, unanimously, by the Court of Appeal affirming an Order of Thorne, J., dismissing a motion to vary a decision of the Official Assignee, that charges for electricity supplied were not payable in priority to the ordinary debts of the bankrupt.

The facts sufficiently appear from the certificate of the Official Assignee and the judgment of Thorne, J.

CERTIFICATE OF THE OFFICIAL ASSIGNEE (under Rule 26 of Schedule B to Ordinance No. 44 (Bankruptcy).

"1. In this proof, sworn the 10th August, 1931, the Municipal Commissioners of Singapore claim $5,408.46 as a debt, having priority over other debts under Ordinance No. 135 (Municipal) Section 253 (9) and Ordinance No. 44 (Bankruptcy) Section 43 (1) (c).

2. This sum is stated to be the nett loss incurred in supplying electrical energy to the debtors' rubber factory under an agreement dated the 2nd July, 1930; it is therefore *prima facie* a contract debt.

3. Section 253 (9) of Ordinance No. 135 (Municipal) makes charges for supply of electricity recoverable in like manner and by the like procedure as taxes. Section 43 (1) (c) of Ordinance No. 44 (Bankruptcy) gives priority to any sum due in respect of taxes for the current year.

4. The Municipal Commissioners contend that the effect of these two sections is to change the character of this debt from that of a contractual liability to that of a tax. In my opinion this contention is unsound. This section of the Municipal Ordinance deals with procedure only; the words are not apt to effect a change in the character of the debt, which change would necessarily alter the substantive rights of other parties. The Municipal Ordinance was enacted later than the Bankruptcy Ordinance and the legislature must be taken to have the earlier statute in mind when framing the later one (See Beal p. 290).

4. These charges are not rates or taxes; they are in substance payments for electricity supplied (*Badcock & Hunt* 22 Q.B.D. 145).

5. Fiscal and charging statutes are to be construed strictly against the party in whose favour they are made (See Beal p. 436). The onus of shewing that they are entitled to priority is on the Commissioners and in my view they have not discharged it.

6. For these reasons I am of opinion that in so far as this proof claims to be preferential it must be rejected. It is, however, admitted to rank for dividend."

The Municipal Commissioners applied to the Court by Motion to reverse or vary the decision of the Official Assignee.

Storr for the Applicants.

Haydon for a creditor opposing the application.

E. N. Taylor Assistant Official Assignee, was not called on.

The arguments sufficiently appear from the Judgment.

Cur. ad. vult.

THORNE, J.—"The Municipal Commissioners of Singapore filed an amended proof in this bankruptcy on the 10th day of August, 1931, by which they claimed priority in respect of a sum of $5,408.46 which they alleged to be due. The proof was not before me on the hearing of this motion, but I have referred to it since and find therefrom that the claim is for the nett loss incurred in providing a supply of electricity under the terms of an agreement in writing between the Municipal Commissioners and the Bankrupt which bears date the 2nd day of July, 1930.

The proof contains a further claim of $682.50 the cost of a sanitary installation, but as to this item no priority is claimed.

Acting under the third Schedule to the Bankruptcy Ordinance, Article 26, the Official Assignee admitted the proof to rank for dividend for the full amount, but rejected it in so far as there was a claim to priority.

This ruling of the Official Assignee is contained in his certificate of the 8th day of September, 1931, and the facts set out in that certificate were, for the purpose of these proceedings, admitted to be correct. The only other facts which may be of importance are that the date of the Receiving Order was the 24th October, 1930, and on the same date an order of Adjudication was made against Tan Teng Hian, and that no levy had been made by the Municipal Commissioners, nor so far as I am aware was any

warrant issued, before the date of the Receiving Order.

The claim to priority on the part of the Municipal Commissioners arises in this way.

Section 253 (9) of Ordinance 135 (Municipal) is as follows:—

> "All moneys which accrue due from any person in respect of the supply of gas or electricity under this section to any premises owned or occupied by him, or for work done or materials provided in connection therewith, shall be recoverable from such person in like manner and by the like procedure as if such moneys were taxes leviable under this Ordinance."

Section 43 (1) (c) of Ordinance 44 (Bankruptcy) provides that:—

> "In the distribution of property of a bankrupt there shall be paid in priority to all other debts
>
> (c) any sum of money due at the date of the Receiving Order from the bankrupt to the Municipal Commissioners in respect of rates or taxes for the current year under the provisions of any Ordinance dealing with Municipal affairs."

The case for the Municipal Commissioners is that the effect of these two statutory provisions is to accord them priority in respect of all sums due to them, at the date of the Receiving Order, for electricity supplied to this bankrupt.

The Official Assignee contends that the Municipal Ordinance is a taxing ordinance and that the burden rests upon the person claiming priority to establish that right and if the statutory provision does not upon its true construction give a preference in the clearest possible language no such priority as is claimed can exist. He says further that the Bankruptcy Ordinance does not give any preference in the cases of charges for electricity supplied, and that the claim of the Municipal Commissioners therefore fails.

It is to be observed that Section 38 (1) (c) of Ordinance 44 (Bankruptcy) gives a priority to the Municipal Commissioners in respect of "rates or taxes for the current year." I am not quite clear what is the true interpretation of the words "for the current year." Does this mean the current calendar year, or the current financial year or the year current under any contract entered into by the Municipal Commissioners with any person for the supply of electricity under the provisions of Section 253 (1) of their Ordinance? I am of the opinion that these words must be interpreted to mean the current calendar year.

Rates are assessed under the provisions of Section 58 of the Ordinance, and under sub-section 3 of that section enure for 12 months and are payable half yearly.

Taxes are levied under the provisions of Section 80 of the Ordinance and are in that section described as annual taxes and are by subsection 2 of that section payable in advance in the months of January and July of each year. The Municipal Commissioners therefore have a priority in respect of rates and taxes but as I read this section this priority is limited to any rate or tax due in respect of the current calendar year so that if the Municipal Commissioners allow a year to expire without having collected the full amount due to them for rates and taxes this priority is lost. The language in this section is in contrast with the provisions of section 45 (1) which preserves the landlord's power to distrain for rent but declares that a distress for rent after the commencement of the bankruptcy shall be leviable only for three months' rent accrued due prior to the date of the order of adjudication.

It may be that the language used was chosen deliberately in view of the fact that taxes are annual and are payable in advance but charges for electricity are not payable in advance.

If it be the policy to give the Municipal Commissioners priority for all sums due at the date of the Bankruptcy with perhaps some limit, as in the case of landlords, as to the amount of the arrears in regard to which priority can be claimed it would seem that this Section should be amended.

The important words of Section 253 subsection 9 are "recoverable in like manner and by the like procedure as if such moneys were taxes leviable under this Ordinance." It is therefore necessary to consider how these taxes are leviable.

Under Section 87 (1) of the Municipal Ordinance if taxes imposed are not paid a notice must be issued requiring the defaulter to pay the sum within seven days. Under subsection 2 if the amount is not paid within seven days a warrant must be issued to an officer of the Municipality directing him to levy the amount and recover by seizure and sale of the moveable property of the defaulter from within the Settlement.

Under Section 88 this warrant is described as a warrant of distress.

It is noteworthy that Section 45 (1) (c) of Ordinance 44 confers upon the Municipal Commissioners a priority in respect of both rates and taxes. A comparison of sections 69 and 70 of the Municipal Ordinance with Section 87 shews that the procedure to be adopted in each case is not exactly identical although the steps to be taken in each case result in seizure and sale of the goods of the defaulter. This, however, is perhaps academic for the reason that the section we are considering provides the machinery for the recovery of moneys due for electricity supplied

and charges in respect thereof as if such moneys were taxes.

Counsel for the Commissioners relied on the case *Ex parte Harrison, In re Peake* reported in 13 Q.B.D. at page 753.

In this case the Corporation of Walsall were empowered by statute to recover from any person any rent or charge due to them for gas supplied by the like means as landlords are for the time being by law allowed to recover rent in arrear. Messrs. Peake and Fisher filed a liquidation petition in the County Court being then indebted to the Corporation for gas supplied. The Corporation distrained. A trustee was appointed, who paid out the distress and applied to the County Court for an order declaring the distress invalid as against him. The County Court Judge declared the distress invalid and the Corporation appealed.

The appeal was allowed and a further appeal was preferred to the Court of Appeal.

The Court of Appeal affirmed the decision on the first appeal, holding the distress valid.

It was argued in this case that the words "by the like means as landlords are allowed to recover rent in arrear" were merely meant to point out the process by which the Corporation might enforce their claim and not to give them any preferential right. But it was held that if the process when put in force does of itself give a preference it followed that the Corporation by putting the process in force may obtain the same result and the same benefit as landlords are by law allowed to obtain by that process. Now that case is distinguishable from the facts of the present case. Under the provisions of Section 34 of the Bankruptcy Act 1869 the right of a landlord to distrain for rent due from the bankrupt at any time either before or after the commencement of the bankruptcy was preserved with a provision that if the distraint was levied after the commencement of the bankruptcy it should be available only for one year's rent accrued due prior to the date of the Adjudication. Section 13 of that Act empowers the Court to restrain further proceedings in any action, suit, execution or other legal process against a debtor in respect of any debt provable in bankruptcy. The Municipal Commissioners have not the same powers in recovery of taxes as landlords have for the recovery of rent in arrear. The provisions of section 34 of the Bankruptcy Act 1869 are in effect identical with Section 45 (1) of the Bankruptcy Ordinance which declares the right of a landlord to distrain on the goods of a bankrupt for rent due to him either before or after the commencement of the bankruptcy.

Mr. Haydon, for the respondent in this matter, relied on the case of *Ex parte Hill, In re Roberts* reported in 6 Chancery Division at page 63. In that case a Gas Company were empowered by statute to levy by distress sums due to them for the supply of gas, and any Justice to issue a warrant levying the amount due. The Gas Company obtained warrants of distress and seized the debtor's goods. The debtor became bankrupt, and a Receiver was appointed. Interim injunctions were obtained in the County Court restraining further proceedings under the warrants. An injunction was afterwards granted by the London Bankruptcy Court. The trustee for the bankrupt applied to the Court to make the injunction perpetual. Registrar refused the application, and the trustee appealed. The Court of Appeal reversed the order of the Registrar holding that, although some of the moneys due to the Gas Company were spoken of as "rent," the Company were not authorised to recover moneys due by the same means as landlords are empowered to recover rent in arrear and, although the Company were empowered to recover by distress, that was only a mode of proceeding for the purpose of obtaining the amount due to them. It was held further that Section 34 of the Bankruptcy Act 1869 only applied to cases where the relation of landlord and tenant subsisted between the parties, and that therefore the Gas Company although entitled to proceed by distress to enforce payment were not entitled to priority in bankruptcy in respect of the amount due to them. It is to be observed that Lord Justice Baggallay and Lord Justice Cotton were members of the Court of Appeal which decided both these cases, and in the judgment of Baggallay L.J. in *Ex parte Harrison* he states that the decision in *Ex parte Hill* is to be supported. It was also held in *Ex parte Hill* that though the Company were entitled to levy by distress the case did not fall within Section 34, but within Section 13 of the Bankruptcy Act 1869 which is to the same effect as Section 10 (2) of our Ordinance.

This latter case too is not exactly parallel with our case for the reason that the Gas Company were not empowered to distrain themselves but could only go to a Justice and obtain from him his warrant to levy the amount and it would appear that the Court were of opinion there that a levy under the Justice's warrant was an "execution or other legal process" within the meaning of Section 10 (2) of our Bankruptcy Ordinance.

To apply these cases to our local law it would appear that the *ratio decidendi* is this. If a Corporation are empowered to recover moneys due to them by the like means that a landlord is entitled to proceed to recover rent in arrear then the Corporation is afforded the same priority as a landlord would have under Section 45 of Ordinance

44 (Bankruptcy) but if, although entitled to recover by distress, the Corporation is not declared to be entitled to recover by the same means as does a landlord proceed to recover rent in arrear and is unable to issue a distress warrant itself as does a landlord in England but is compelled to apply to a Justice to issue his warrant, then process by distress is a process of execution which does not fall within the provisions of Section 45 and the Corporation are not entitled to any priority.

In the case before me, however, the Bankrupty Ordinance declares a priority in favour of the Municipal Commissioners in respect of rates and taxes for the current year.

Sums due for electricity supplied and cognate charges are neither rates nor taxes. (See *Badcock and another v. Hunt*, 22 Q.B.D. p. 145. See the Judgment of Lord Justice Lindley in *Ex parte Harrison, In Re Peake, supra*). These moneys are recoverable in like manner and like procedure as if they were taxes leviable under the Ordinance. As I have pointed out, the procedure to recover taxes is by warrant directing a levy upon the goods of the person indebted. Taxes may, therefore, be properly said to be leviable under the Municipal Ordinance.

I was much pressed by Mr. Storr for the Commissioners with the reasons given for the judgments in the case of *Ex parte Harrison, In re Peake,* and I am fain to confess that it seemed to me at first sight that the reasoning of the Court of Appeal applied in this case. The analogy is this. A landlord has a right to distrain for rent in arrear and is entitled to a priority. The Municipal Commissioners have power to distrain to recover taxes and are declared by the provisions of the Bankruptcy Ordinance equally to have a priority.

At the same time this reasoning offended my own notions as it seemed to me improper that in the absence of strict statutory provision to that effect one simple contract creditor for the supply of goods sold and work and labour done should have a priority over other creditors of equal degree.

Under maturer consideration I have come to the conclusion that the case of *In re Harrison Ex parte Peake* is of no real assistance in the decision of this question and however attractive the argument may appear at first sight, it is not tenable. The Corporation in that case were empowered to recover by the like means as a landlord and as I have already pointed out the right of landlords to distrain for rent both before and after the commencement of the bankruptcy was preserved. The Corporation therefore had the power even after bankruptcy to levy distress and that right carried with it the priority conferred by the Bankruptcy Ordinance.

In the case we are considering, however, although the Municipal Commissioners have a right to distrain before bankruptcy they have no right to distrain after bankruptcy, and if they sought to do so their proceedings could be restrained under the provisions of Section 10 (2) of the Ordinance. This I think suffices to distinguish the position of the Municipal Commissioners from that of landlords and I am of the opinion that the Municipal Commissioners in the circumstances of this case are not entitled to any priority in respect of this proof.

Fiscal and charging statutes are to be construed strictly against the party in whose favour they are made. In my view the burden rests upon the Municipal Commissioners to establish that they are entitled to a priority in respect of these charges for electricity, etc., under the provisions of section 43 (1) (c) of the Bankruptcy Ordinance.

I have already held that these charges are not taxes within the meaning of that Section and the Municipal Commissioners therefore fail to establish the right they claim.

I order, therefore, that the motion stand dismissed with costs against the Municipal Commissioners."

The applicants appealed to the Court of Appeal.

The Hon. Mr. A. P. Robinson for the Appellants.

The claim is for supplies before the Receiving Order. No steps have been taken for recovery except by filing a proof in the bankruptcy.

Ordinance No. 135 (Municipal) sections 253 and 67.

The Commissioners may issue a warrant of seizure and sale of their own motion and without recourse to any Court.

It is not a true tax. No legal process is necessary.

Ordinance No. 44 (Bankruptcy) sections 43 1 (c), 10 (2) and 45 (1).

The Commissioners are in the same position as though this claim were for a tax because they have the same means and procedure as for recovery of a tax, including the right of distraining under section 37 of Ordinance No. 135 which is still available.

"Manner" and "procedure" in section 253 (9) are not identical.

Ex parte Birmingham and Staffs, etc., Co. L.R. 11 Eq. p. 615, see the judgment of Bacon C.J. at p. 618.

"Like means" confer like rights.

Distress leviable at the party's own motion is not restrainable under Ordinance No. 44 section 10 (2).

The vesting of the bankrupt's property in the Official Assignee does not exempt it from seizure under Ordinance No. 135, section 87.

But even if the Commissioners have only the "like procedure" they are still entitled to priority under Ordinance No. 44 section 43 (1) (c) because Ordinance 135 section 253(9) is in general terms and is not limited to the "means" given by section 87 but includes also the means available in bankruptcy, *i.e.*, by preferential proof.

Their right of distress is still available after bankruptcy; Ordinance No. 44 section 10 (2) does not take it away.

Thorne, J. based his judgment on the view that the right of distress does not survive after bankruptcy. I submit that that view is erroneous.

Ex parte Harrison, in re Peake, 13 Q.B.D. p. 753, affirms the *Birmingham and Staffs, etc.*, case (*supra*) on the point that "means" carries with it "rights." The real effect of Ordinance No. 44 section 45 (1) is to preserve the right to distrain, either before or after bankruptcy, for rent accrued due before.

Moreover Thorne, J. says the Commissioners are simple contract creditors but later he refers to the Municipal Ordinance as a "taxing statute" which is inconsistent. If these charges have the attributes of a tax they are recoverable as a tax under Ordinance 44 section 43 (1) (c).

Exp. Hale., 1 Ch. Div. p. 285.

Ordinance No. 44 (Bankruptcy) is a restrictive not an enabling Ordinance. It is not for me to shew that the right is expressly conferred; it is for the Official Assignee to shew that a right which the Commissioners would otherwise have is expressly taken away.

In re Wells 1929, 2 Ch. p. 269 at p. 275.

The right is very ancient.

Briggs v. *Sowry* 8 M. and W. 729 at pp. 734, 739 and 742.

The object is to protect public funds; the Commissioners are not to be looked on as trade creditors.

Badcock v. Hunt, 22 Q.B.D. 145, turned on the interpretation of a lease and the charge there was held not to be a rate and is not in point. If it is, then to the contrary is *Re Mannesmann Tube Co.* (1901) 2 Ch. at p. 97; charges for water ascertained by a meter were held to be preferential in a winding up.

The procedure by proof followed, if necessary, by this motion in the bankruptcy to secure priority of payment is the very procedure for recovery of a tax.

E. N. Taylor, Assistant Official Assignee. All the arguments for the appellants come back to Ordinance No. 44, section 43(1)(c) which reads ".....rates and taxes *for the current year*" clearly implying true rates or taxes, which fall due periodically. This proof is partly for charges for electric current supplied and partly for the cost of removing machinery—it is in the nature of a proof for goods sold or for work and materials.

Section 10 (2), on which the appellants rely, is not applicable. The relevant provision is section 8 (1) which does take away their right to issue a warrant and levy the amount by seizure. They say they can still do so, even now, but that is not correct. The warrant is a legal process within the meaning of section 8 (1) and it is not a distress.

The procedure is by way of proof in the bankruptcy which is exactly the same whether the amount be payable preferentially or not. The priority which they have for taxes is not given by the procedure, but by the statute.

Ex parte Hale (*supra*) and the other cases all depend on tenure and are not in point.

All ordinary remedies cease on bankruptcy. This is the general principle expressed in the widest terms in section 8. But there is an exception specially provided by section 45 which preserves the landlord's right of distress though in respect only of a strictly defined period.

Haydon for a creditor opposing the appeal.

The English cases refer to public utility companies under a statutory obligation to supply any consumer in a given district, on demand. Our Ordinance says that the Commissioners *may* supply and they do so under an agreement. They have, in effect, a monopoly. They are at liberty to take payment in advance and hence they do not require the protection of a preferentiai right in bankruptcy.

The priority which they claim is one not given to any private individual so the section should be construed strictly against the Commissioners. It is a charging statute.

Beal on Legal Interpretation, (2nd edition) at pp. 400 and 436.

The Bankruptcy Ordinance is the older of the two statutes in question and presumably section 43(1)(2) relates to such electricity charges as were in force when the Ordinance was passed.

The words "by like means" or "in like manner" refer to procedure only and do not alter the nature of the charges.

Distraint is a procedure *in rem*, whereas a warrant of seizure is a procedure *in personam* and this is the real reason why the landlord's right of distress survives after bankruptcy.

The Hon. Mr. A. P. Robinson (in reply).

'Seizure and Sale' is merely an extension of the ancient right of distress which was to hold only, not to sell. A tax is not necessarily periodical and money due under an agreement is within Ordinance No. 155 section 253 (9).

Cur. ad. vult.

MURISON, C.J.—I have had the opportunity of reading the judgments of Burton and Terrell, JJ., in this appeal.

I agree, for the reasons which they give, that the appeal should be dismissed with costs.

BURTON, J.—In this appeal the Municipal Commissioners of Singapore seek to establish a preferential claim against the estate of the Bankrupt for a debt of $5,408.46 for electrical charges. The claim is founded upon section 253 (9) of Ordinance 135 (Municipal).

> "All moneys which accrue due from any person in respect of the supply of gas or electricity under this section to any premises owned or occupied by him or for work done or materials provided in connection therewith shall be recoverable from such person in like manner and by the like procedure as if such moneys were taxes leviable under this Ordinance,"

and section 43 (1) (c) of Ordinance 44 (Bankruptcy)—

> "In the distribution of the property of a bankrupt there shall be paid in priority to all debts....."
>
> "(c) Any sum of money due at the date of the Receiving Order from the Bankrupt to the Municipal Commissioners in respect of rates and taxes for the current year under the provisions of any Ordinance dealing with Municipal affairs."

The argument of Mr. A. P. Robinson is that section 253 (9) puts the Commissioners in exactly the same position as if the claim is a tax, that "the same manner and procedure of recovery" which they have by statute implies that they have all the rights and privileges that attach to the recovery of a tax. He relied on *Ex parte Birmingham and Staffordshire Gas Light Co.*, L.R. 11 Eq. at p. 618 where Sir James Bacon said,

> "The 155th section of the principal Act, under which the Appellant company is constituted, gives to the company all the means—and by this it was clearly intended to give them also all the rights—which landlords have for the recovery of rent in arrear."

The Legislature by giving like means of recovery, confers at the same time all the rights of the privileged person.

I do not think this case is analogous to ours The statute does not give the Commissioners the same rights as a landlord for the recovery of their electrical charges. The nature of their rights is set out in section 87 (2)—

> "If any such amount and fee are not paid within the said period of seven days, a warrant shall be issued to some collector or other officer of the Municipality named therein, directing him to levy the same and the costs of recovery by seizure and sale of all and singular the moveable property of the defaulter found within the Settlement in which the Municipality is situate."

The landlord's right to distress is a paramount right which survives the Receiving Order, and section 45 (1) of the Bankruptcy Ordinance states as much, though it limits the right. What Bacon C.J. meant, I think, when he used the words "and by this it was clearly intended to give them all the rights" was that the statute by giving the Birmingham Gas Company all the means which landlords have for the recovery of rent in arrear conferred on them by necessary implication the right to distrain after the making of a Receiving Order.

But Mr. Robinson attempted to shew that the Commissioners' right to seizure and sale survived the Receiving order, on the authority of the same case, and could not be stayed under section 10 (2) of the Bankruptcy Ordinance. He relied on a passage in the judgment of Sir James Bacon C.J. *(ubi sup.)*—

> "I think it quite plain that a distress for rent cannot be considered to be included in the expression 'legal process' in as much as no legal process whatever is necessary, and the landlord may, if he thinks proper, distrain with his own hands."

The first step in the recovery of a tax by the Municipality is the issue of a warrant, which I think is not a process within the meaning of section 10 (2), because it is issued by the Municipality itself and has nothing to do with a Court. I do not think therefore that the warrant of the Commissioners' could be stayed under section 10 (2). But that does not mean that the right to seizure and sale survives the Receiving Order. If the Commissioners had been given the rights of a landlord, that right would have survived the bankruptcy by virtue of section 45 (1) of the Bankruptcy Ordinance but Mr. Robinson has still to shew that the right to levy for a tax survives the Receiving Order. The effect of a Receiving Order is stated in section 8 of the Bankruptcy Ordinance—

> 8 (1) "On the making of a receiving order the Official Assignee shall be thereby constituted receiver of the property of the debtor and thereafter, except as directed by this Ordinance, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt or shall commence any action or other legal proceeding in respect of such debt unless with the

leave of the Court and on such terms as the Court may impose."

Subsection (2) saves secured creditors, and (as I have said) section 45 (1) saves the landlord's right. But I can find nothing in the Ordinance to save the Municipality's right of levy for a tax. The Bankruptcy Ordinance treats these Municipal rates and taxes differently from a landlord's rents, and section 43 (1) (c) of the Bankruptcy Ordinance specially reserves a priority for Municipal rates and taxes, which would not have been necessary if the power to issue the warrant had survived the Receiving Order. No priority is given to a landlord's rent for which he may issue distress.

I think it is plain therefore that the case of the Birmingham Gas Company does not apply to the present case. The determination of the question in dispute rests, I think, simply on the interpretation of section 43 (1) (c). It is quite clear to me that these charges are not rates and taxes. They are only recoverable "in like manner and by the like procedure." But the Bankruptcy Ordinance gives priority to "money due in respect of rates and taxes" and this sum is not money due in respect of rates and taxes but money due on a contract to supply electricity. The Bankruptcy Ordinance does not give priority on "money recoverable in like manner and by like procedure to rates and taxes."

It seems to me therefore on the plain wording of the Ordinance that no priority arises and I think the appeal should be dismissed with costs.

TERRELL, J.—The Municipal Commissioners claim priority for a sum of $5,408.46 being the loss incurred in supplying electricity to Chop Hoe Seng under an agreement dated 2nd July, 1930.

Their claim is based partly on the provisions of section 253 (9) of Ordinance No. 135 (Municipal) and partly on the provisions of section 43 (1) (c) of Ordinance No. 44 (Bankruptcy). The two arguments are really quite distinct and it will be necessary to consider them separately.

Under Section 253 (9) charges for electricity may be recovered "from such person in like manner and by the like procedure" as if they were taxes leviable under the Ordinance.

Under Section 87 (1) if any tax is not paid a notice may be issued requiring the defaulter to pay and under Section 87 (2) if the tax is not paid a warrant may be issued "to some collector or other officer of the Municipality named therein directing him to levy the same and the costs of recovering by seizure and sale of all and singular the moveable property of the defaulter found within the Settlement in which the Municipality is situate."

This is in effect a method of execution though it can be put into effect by the Municipality without application to the Court, or in other words, without legal process. Counsel for the Municipal Commissioners continually referred to this method of recovering taxes as a distress and would appear to have had some justification for so doing as, although the matter was not referred to in argument, Section 88 of the Ordinance refers to the warrant as a warrant of distress. It is I think an unfortunate expression as there is a considerable difference between a process of execution and a process of distress. Distress is an ancient remedy reserved for landlords and giving the right to seize and sell property on the premises let even though in some cases it may not be the property of the tenant. It gives no right to seize the tenant's property elsewhere than on the premises. Execution however can only be levied on the debtor's property and may be so levied whenever such property may be found. Notwithstanding therefore the loose language of Section 88 there can be no doubt whatever that the process for recovering taxes under Section 87 is a process of execution and has nothing whatever to do with a landlord's rights and remedies.

To my mind therefore *Ex parte Harrison, In re Peake*, 13 Q.B.D. page 753, is no authority at all. In that case a corporation was empowered by statute "to recover from any person any rent or charge due to them by him for gas supplied, by the like means as landlords are for the time being by law allowed to recover rent in arrear." The statute clearly gave a landlord's right of distress which was exercisable after the filing of a bankruptcy petition under the Act of 1869. As under our Ordinance the remedy to recover taxes is by a process of execution, a decision under an Act which gives right of distress has no application. The case of *Ex parte Harrison* followed *Ex parte Birmingham and Staffordshire Gas Light Company*, XI Equity page 618, where the Company had a similar statutory right "to recover by the same means as landlords may recover rent in arrear." It was held that the distress could not be restrained under Section 13 of the Act of 1869 (corresponding to our Section 10 (2) as distress was not a legal process. Counsel for the Municipal Commissioners relied in particular upon the first line of the judgment at page 618 where it is stated "The principal Act.....gives the Company all the means—and by this as was clearly intended to give them also all the rights—which landlords have for the recovery of rent in arrear." But this can only mean that if the Bankruptcy Act preserved a landlord's right of distress, it also preserved the Gas Company's right as under the Statute they were in the

position of landlords and had the same remedies reserved to them. It is now necessary to consider the provisions of Ordinance No. 44 (Bankruptcy) as to the effect of bankruptcy. Section 8 (1) provides that " on the making of a receiving order the Official Assignee shall be thereby constituted receiver of the property of the debtor and thereafter except as directed by this Ordinance no creditor.....shall have any remedy against the property or person of the debtor in respect of the debt."

Section 10 (2) provides " The Court may at any time after the presentation of a bankruptcy petition stay any action, execution or other legal process against the property or person of the debtor."

The wording of these two sections could hardly be wider and *prima facie* a landlord's right of distress would be taken away were it not preserved by the express provision of Section 45 which reserves to a landlord the power to distrain " whether before or after the commencement of the bankruptcy " but limits such right to three months' rent accrued prior to the date of adjudication. It is true that these are *dicta* in *Ex parte Hale*, 1 Ch. D. page 285, to the effect that the landlord's right of distress is merely limited to so much rent—in England a year's rent—accrued due before the date of adjudication but does not limit the landlord's right in any other way, and that accordingly the right to distress continues in respect of rent accrued due, after the adjudication. It was suggested by the Assistant Official Assignee that the reason for this is that on bankruptcy a lease or tenancy vests in the Official Assignee and accordingly there is privity of estate between the landlord and the Official Assignee and a right to distress naturally follows. Whether that is so or not has little bearing on the issue before the Court as the right of the Municipal Commissioners in respect of taxes is a right of execution and not a right of distress.

If it required statutory provision to preserve the landlord's right of distress, a similar provision would clearly be necessary to preserve the Municipal Commissioners' right to levy execution for taxes and there is no such provision in the Ordinance. Section 87 of Ordinance 135 (Municipal) is in its nature a fiscal or charging provision and according to well settled authority must be strictly construed. It is quite impossible to presume that the Commissioners' right of execution in respect of taxes is preserved in the absence of provision to that effect.

I have no doubt therefore that on bankruptcy the remedies under Section 87 of the Ordinance are superseded. It follows that at the same time the Commissioners lost any right they may have had to enforce payment of charges for electricity by seizure and sale of the debtor's property.

This disposes of Mr. Robinson's first argument. His second argument is that charges for electricity receive preferential treatment under Section 43 (1) (c) which gives such preference to Municipal rates and taxes.

Now I have found that on bankruptcy the Commissioners' right to enforce payment of taxes by seizure and sale of the defaulter's property lapsed. In lieu thereof they are given the right to have "the rates and taxes for the current year" treated as preferential debts. Mr. Robinson argued that as charges for electricity may be recovered "in like manner and by like procedure as if such moneys were taxes" the Commissioners had the right to recover such charges after bankruptcy by having them treated as preferred debt.

It appears to me that there are two fatal defects in this argument. To begin with Section 43 (1) (c) refers to "rates and taxes for the current year." Such rates and taxes are payable half yearly in advance and the subsection clearly refers to rates and taxes properly so called. The Court had no information as to how the charges under the agreement of the 2nd July, 1930, were payable, but as the amount of the electricity consumed could not be ascertained until after its consumption, it is quite impossible that the charges were payable half yearly in advance. In fact the words of Section 43 (1) (c) are quite inapplicable to charges payable under an agreement for the supply of electricity.

The second objection is that Section 253 (9) does not give the Commissioners the right to have the money owing treated as a preferential debt. It was argued, on the authority of the *Birmingham and Staffordshire Gas Light Company's case*, that the Commissioners having the same means to recover as in the case of taxes had all the right incident thereto. But this argument clearly involves a fallacy—the right conferred on them is the right to levy by seizure and sale of the defaulter's property under Section 87, and such right lapsed on bankruptcy.

If there were any doubt about this contention it would be set at rest by the actual words of Section 253 (9) which provides that the charges for electricity are recoverable *from such person* in like manner and by the like procedure as if such moneys were taxes. After bankruptcy it would be incorrect to say that the filing of a preferential proof is a method of recovering the money from the defaulter. The words 'from such person' would appear to emphasize the fact that the Commissioners' remedies in the case of electrical charges are limited to the period before bankruptcy. As the Commissioners chose to allow these charges to accumulate to over $5,000 without taking any action before bankruptcy they

have lost any right except to prove in the bankruptcy as ordinary creditors. I might add that on principle I should not feel disposed to give the Commissioners a priority for debts incurred by them in their capacity as a trading concern and in the absence of clear statutory provision, I think that this claim must fail.

I would dismiss the appeal and direct the appellants to pay the costs of the Official Assignee and the supporting creditors.

Appeal dismissed.

Solicitors for the Appellants—*Drew & Napier.*

The Official Assignee—*Respondent.*

Solicitors for the opposing Creditor—

Donaldson & Burkinshaw.

[APPELLATE CIVIL JURISDICTION]

THE STRAITS STEAMSHIP CO., LTD.

Plaintiffs (Respondents)

vs.

Lieut. J. H. OWEN, D.S.O., R.N.R.

Defendant (Appellant)

[PENANG CIVIL APPEAL No. 6 of 1932]

Shipping—sanction to prosecute—Harbour Master's discretion—refusal to exercise—mandamus—Crown's servants—whether compellable—Ss. 14, 17 & 444, Ordinance No. 125 (Merchant Shipping).

By section 14 of the Merchant Shipping Ordinance every foreign going steamship is required by law to be provided with officers properly certificated in accordance with the scale therein mentioned. A motor schooner "Kim Kean Aun" plying between the Burmese and the Colony ports arrived in Penang on the 29th February, 1932, defectively manned and the Plaintiffs desired to prefer a charge against its owner under section 17 of the Ordinance. Before they could do so, they would have to obtain sanction from the Harbour Master, the defendant in this case. An application was duly made to that officer for the necessary sanction but this was refused as a result of instructions received by him from the Colonial Secretary.

Held by the Court of Appeal (Murison, C.J.; Thorne, Ag. C.J., and Terrell, J.) that a mandamus could properly issue to the Harbour Master to exercise his discretion in granting or refusing sanction to prosecute.

The Court in the exercise of its prerogative jurisdiction to grant or refuse a mandamus cannot do so against the Crown, or against an executive officer of the Crown charged with the performance of statutory duties owed to the public. The Court, however, can and will order a writ of Mandamus to issue to compel the performance of duties in the performance or non-performance of which some section or member of the public, in this case the plaintiffs, is especially interested.

The statutory power vested in the Harbour Master imposes upon him a duty to the public, in the performance of which duty he is bound to exercise his discretion.

APPEAL from an order *nisi* of Whitley, J., for a prerogative Writ of Mandamus to be issued commanding the Harbour Master of Penang to grant a sanction to the plaintiffs to prefer a charge against the owner of the motor vessel "Kim Kean Aun" under Section 14 of Ordinance No. 125 (Merchant Shipping).

The facts and arguments are related in the Judgment of Murison, C.J., below.

Mills, Acting Attorney-General, for the Appellant.

Hume, for the Respondent.

Cur. Ad. Vult.

MURISON, C.J.—This is an appeal against an order of Whitley, J.

The proceedings were first commenced by an action (Suit No. 97 of 1932, Penang) wherein the Plaintiffs-Respondents (hereinafter referred to as the Company) issued a writ dated the 16th March, 1932, for a mandamus commanding the Defendant-Appellant (hereinafter referred to as the Harbour Master) to grant a sanction to the Company to prefer a charge against one Ng Kin Yin the master of the motor-schooner "Kim Kean Aun" under section 14 of Ordinance No. 125 (Merchant Shipping) for an offence punishable under section 17 of the said Ordinance.

When the case came on for hearing Mr. Gibson, for the Harbour Master, objected that the procedure should be by application for a prerogative writ of mandamus. The trial judge agreed and the action appears to have been discontinued.

Then upon the 31st March, 1932 the Company took out an originating motion (No. 4 of 1932, Penang) moving that the Harbour Master be ordered to show cause why a prerogative writ of mandamus should not be issued commanding him to grant a sanction to the Company to prefer the same charge as is set out above.

Upon this motion Whitley, J., granted an order *nisi* which came on for hearing on the 8th April, 1932.

The facts in the main are not in dispute nor is there any dispute as to the sections of the Ordinance No. 125 (Merchant Shipping) applicable. Both can be stated shortly.

The Company's ships and the motor-schooner ply in competition between the Burmese and Colony ports. The Company and the owner of the motor-schooner are both subject to the Ordinance. Section 14 requires that such ships shall be provided with officers duly certificated according to a specified scale. At all times material to these proceedings the Company's ships complied with these requirements and the motor-schooner did not. In these circumstances the Company's contention is that the motor-schooner constitutes a danger to their ships and can compete on an unfair basis with their ships.